United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL 77-2032

Argued by
ANTHONY J. GIRESE

United States Court of Appeals

For the Second Circuit

JOSEPH COLLINS,

Petitioner-Appellant,

against

WALTER FOGG, Acting Superintendent,
Green Haven Correctional Facility,

Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR RESPONDENT-APPELLEE

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
The State Judgment	2
Opinions and Decisions Below	2
Statement of the Case	3
Summary of the Crime	3
The Events Leading to the Confession	3
Argument	
The state courts and the district court properly found that Collins' statements to the police were voluntary	6
a. Collins did not attempt to invoke his right to the assistance of counsel at his interrogation	7
b. If Collins did attempt to invoke his right to counsel, he thereafter waived that right	11
c. Federal habeas review of the *Miranda* claim is foreclosed under the rationale of *Stone* v. *Powell*	12
d. There was no physical coercion	14
Conclusion	16

TABLE OF AUTHORITIES

PAGE

Cases:

Brewer v. Williams, 20 Cr. L. 3095 (1977) 11n, 12, 13

Collins v. Fogg, 425 F. Supp. 1339 (E.D.N.Y. 1977) .. 2, 3, 7n

Grimsley v. State, 251 So.2d 671 (D.Ct.App. Fla. 1971) 10n

Lokos v. Capps, 528 F.2d 576 (5th Cir. 1976) 15

Michigan v. Mosley, 423 U.S. 96 S. Ct. 321, 46 L.E.2d 313 (1975) 11n

Michigan v. Tucker, 417 U.S. 443, 96 S. Ct. 2357, 41 L.E.2d 182 (1974) 12

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.E.2d 694 (1966) 6, 7, 7n, 8, 11

People v. Collins, 48 A.D.2d 841, 372 N.Y.S.2d 550 (2d Dept. 1975) 2

People v. Collins, 38 N.Y.2d 968, 348 N.E.2d 612, 384 N.Y.S.2d 155 (1976) 2

People v. Harris, 552 P.2d 10 (Colo. 76) 11n

People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 ..... 9n, 15n

People v. Robinson, 67 Mich.App. 442, 241 N.W.2d 238 (Ct.App. 1976) 11

People v. Superior Court, 15 Cal.3d 729, 542 P.2d 1390, 125 Cal.Rptr. 795, *cert. denied*, —— U.S. —— 45 USLW 3249 (1975) 10n

People v. Whitman, 182 Colo. 6, 510 P.2d 432 (1973) 10n

State v. Travis, 26 Ariz. App. 24, 545 P.2d 987 (Ct. App. 1976) 11

Stone v. Powell, —— U.S. ——, 96 S. Ct. 3037, 49 L.E. 2d 1067, rehearing denied —— U.S. ——, 97 S. Ct. 147, 50 L.E.2d 158 (1976) 7, 12, 13, 13n

PAGE

Tanner v. Vincent, 541 F.2d 932 (2d Cir. 1976) 9, 9n, 15

U.S. v. Bettenhausen, 499 F.2d 1223 (10th Cir. 1974) 10n
U.S. *ex rel.* Cerullo v. Follette, 416 F.2d 156 (2d Cir.) *cert. denied* 397 U.S. 1000 (1969) 15
U.S. v. Freeman, 397 F.2d 606 (2d Cir. 1966) 10n
U.S. v. Jackson, 436 F.2d 39 (9th Cir. 1970) *cert. denied* 403 U.S. 906 (1971) 12
U.S. v. Lamia, 420 F.2d 373 (2d Cir.) *cert. denied* 400 U.S. 907 (1970) 10
U.S *ex rel.* Loray v. Yeager, 446 F.2d 1360 (3d Cir. 1971) 15
U.S. *ex rel.* Stanbridge v. Zelker, 514 F.2d 45 (2d Cir. 1975) 15
U.S. v. Womack, 542 F.2d 1047 (9th Cir. 1976) 11n

Constitutional Provisions and Statutes:

New York Penal Law §120.00 2
New York Penal Law §130.35 2
Fourth Amendment 12, 13
Fifth Amendment 12, 13
Sixth Amendment 12, 13
28 U.S.C. 2241 1
28 U.S.C. [2254(d)(8)] 15

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BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

By a certificate of probable cause granted February 3, 1977 (Platt, J.), Joseph Collins appeals from an order of the District Court for the Eastern District of New York (Platt, J.), entered January 28, 1977, dismissing his petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241.

The State Judgment

The writ was directed to a judgment of the County Court of Nassau County (Tomson, J.), which convicted Collins, after a trial by jury, of rape in the first degree [New York Penal Law, §130.35] and assault in the third degree [New York Penal Law, §120.00], and sentenced him to a period of incarcertation not to exceed ten years.

Opinions and Decisions Below

The opinion and order of Judge Platt denying the petition for habeas corpus relief appears at 425 F.Supp. 1339 (E.D.N.Y. 1977).

The opinion of the County Court of Nassau County on the hearing to suppress the confession here in issue is unreported.

The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, affirmed the judgment with one dissenter. *People* v. *Collins,* 48 A.D.2d 841, 372 N.Y.S.2d 550 (2d Dept. 1975).

The New York Court of Appeals unanimously affirmed, with a memorandum. *People* v. *Collins,* 38 N.Y.2d 968, 348 N.E.2d 612, 384 N.Y.S.2d 155 (1976).

Statement of the Case

Summary of the Crime

In the early morning hours of October 20, 1973, Ms. Eugenia Kusky and her four year old child went to a Freeport, Long Island laundromat. Minutes later, Ms. Kusky saw Joseph Collins staring at her through the establishment's front window. Collins entered, sat down on a bench next to the lady, and put his arm around her. She disengaged and walked away. He followed, pushed her to the rear of the laundromat, threw her to the floor, and suddenly began fiercely pounding her with his white, platform-heeled boots. The assault continued for some six minutes. Collins then dragged Ms. Kusky out of the laundromat to a lot at the rear, where he raped her.

Nearby voices frightened Collins off. Police, summoned by a passing car driver, arrived and got a description of Collins. Officer Parker of the Freeport police drove around the area searching. Two minutes later, at about 5:42 a.m., he saw and arrested Collins, who was running in bloodstained clothing and in his stocking feet, carrying his distinctive white boots, now themselves bloodstained.

The Events Leading to the Confession

The facts found by the County Court of Nassau County after a hearing upon Collins' motion to suppress the statements were summarized by the district court in its opinion at 425 F.Supp. 1339 as follows:

> "The following findings of fact were made by the County Court. Eugenia Kusky was using the facilities

of a laundromat in Freeport, New York, when she saw a man whom she later identified as the petitioner herein looking through the glass front of the store. The man entered the laundromat, placed his arm around her, and when she resisted his advances, pushed her to the back of the store and repeatedly 'stomped' on her with heavy, three inch heeled, white boots. Miss Kusky was then dragged out of the laundromat to a lot behind the store and raped. Shortly after the crime, two police officers arrived and found the victim who gave them a detailed description of her assailant. Three to four minutes later, one of the officers arrested the petitioner who was one and one-half blocks from the scene of the crime and running in an easterly direction carrying a pair of blood stained white boots. The petitioner was arrested, advised of his Miranda rights and immediately identified by Miss Kusky. He was taken to the Freeport police station at approximately 5:50 A.M. where his clothes were removed and he was supplied with other clothing. At approximately 7:25 A.M., the petitioner was taken to the Baldwin Precinct where he was advised several more times of his Miranda rights and questioned. He made no inculpatory statements. At approximately 9:30 A.M., Detective Morrissey advised the petitioner of his Miranda rights, and spoke to him about his belief in God. The petitioner then made the first of two confessions which was reduced to writing, signed by the petitioner, and witnessed by two officers. A second confession was made at approximately 12:30 P.M. which parallelled the earlier one in every respect, except that in the second confession the petitioner admitted that he had not visited his girlfriend prior to going to the laundromat as he had claimed in his first confession. At approximately 2:44 P.M. the petitioner was taken to the Mineola Police Headquarters where he was photographed and fingerprinted. In response to a question from a desk officer, he al-

leged for the first time that he had been beaten and kicked by the police and asked to see a doctor. At approximately 4:00 P.M., the petitioner was taken to the Nassau County Medical Center and examined by Dr. Firoozi. The only evidence of a beating found by the doctor was a small abrasion over the petitioner's left eye and numerous red blood cells in his urine.

"The petitioner's account of the events leading up to his confessions differed sharply from the other testimony. He claimed that after his arrest he was placed in the front seat of the arresting officer's car, who was alone at the time, and was beaten over the top and back of his head with a blackjack which 'busted' his nose, caused him to bleed, and injured his *right* eye. The petitioner further claimed that he was never taken to the Freeport police station, that he was repeatedly beaten during the day of his arrest, both in the stationhouses and at the hospital by several police officers including a 'tall blond individual,' and that he requested but was denied the assistance of counsel.

"The State Court found that the testimony of the police officers who arrested and interrogated the petitioner was credible, and that the petitioner was not beaten or coerced into confessing. Specifically, the Court found that there were no 'tall blond cops' who beat the petitioner since there were no policemen fitting that description on the force, that the petitioner's claim that he was beaten in a police car and the stationhouses was incredible in that the only medical evidence of injury was a small cut over the petitioner's *left* eye and a high red blood cell count in his urine. The Court found that the cut must have occurred after the confessions were given since no such injury was visible in a mug shot taken at 3:30 that afternoon, and that the high red blood cell count in the urine was explainable as either a side effect from a recent operation, a result of the violence during the commission of the crime, or a result of the petitioner's own 'thrashing about' in the

police station. The Court also relied on the clarity of the petitioner's signature on the confession in concluding that he had not been beaten by the police. Furthermore, the Court concluded that on each and every occasion that the petitioner was warned of his constitutional rights he replied that he fully understood them and made a knowing, intelligent, and voluntary waiver of those rights." (A25-29)*

ARGUMENT

The state courts and the district court properly found that Collins' statements to the police were voluntary [answering the brief].

Joseph Collins, convicted of rape and assault in the courts of New York, asks this Court to overturn the district court's dismissal of his petition for habeas corpus relief upon the grounds that his statements to the police were improperly admitted into evidence against him at his state trial. Collins claims that he attempted to obtain the assistance of counsel during police interrogation and was denied that right, in violation of *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.E.2d 694 (1966). He further claims that his confession was the product of physical coercion.

The answer to these claims is multiplex. Initially, there was no invocation of the right to counsel; and if there was,

* Numbered references preceded by an "A" are to Petitioner's Appendix. Numbered references *not* preceded by the "A" are to the state court suppression hearing minutes.

The district court's findings represent a short summary of the testimony adduced at a rather lengthy suppression hearing. Respondent will supply this Court, upon request, with the minutes of that proceeding, and with a copy of the brief to the New York Court of Appeals, which contains a lengthier and more detailed summary.

there was then a proper waiver of that right. Moreover, review of the *Miranda* claim is barred by application of the rationale of *Stone* v. *Powell*, —— U.S. ——, 96 S. Ct. 3037, 49 L.E.2d 1067, *rehearing denied* —— U.S. ——, 97 S. Ct. 147, 50 L.E.2d 158 (1976). Finally, there was no physical brutality, and the state courts finding in this regard was properly respected by the district court.

a. Collins did not attempt to invoke his right to the assistance of counsel at his interrogation.

Collins's *Miranda* claim rests on an interpretation of the language he used in a single exchange between him and an interviewing police officer. Briefly put, the sequence of events was as follows.* Collins was arrested one and one-half blocks and three minutes from the situs of the rape. He was advised of his *Miranda* rights, and, upon being identified by the victim, was driven to a precinct of the Baldwin Police, where he was again advised of his *Miranda* rights. Till then, Collins denied guilt. Shortly thereafter, Collins was transported to a precinct of the Nassau County Police.

The crucial exchange occurred when a Nassau County detective began to speak to Collins. The detective advised Collins of his *Miranda* rights, and, when Collins seemed not to be paying attention, departed from the form from which he was reading and began explaining the rights in detail. When the detective, after advising Collins that he could talk to an attorney before speaking, asked Collins if he

* The underlying facts, as found by the state court and reiterated by the district court, are set forth *supra* in the statement of the case. That portion of the testimony of the detective at the state suppression hearing, which is crucial to the *Miranda* issue and which is paraphrased in the argument, was appended to the District Court's opinion [425 F.Supp. at 1342-44] and appears in petitioner's appendix (A34-37).

understood "what an attorney is," Collins indicated that he "thought he did." The officer, concerned, began to explain the functions of an attorney, using the term "lawyer," whereupon Collins indicated that he knew what a lawyer was. Collins then interrupted, asking when he could make "my one phone call." The detective replied that he could make as many calls as he wanted, and asked if Collins wished to do so. Collins replied in the negative. The detective then reemphasized that Collins could have a lawyer at state expense, and then went through all of the *Miranda* rights again. Collins then asked:

> "Do you mean they will give me a lawyer." And I [the detective] says "They will give you a lawyer." And he [Collins] says "What lawyer." And I said "I don't know, it's up to the county they will appoint one. Whether it's Legal Aid or another one, I don't know, but they will appoint one." Then he says "Can you recommend one to me?" And I said "No, we are not allowed to do that." Then he says to me "All right, when am I going to get hit." (A35)

Thereafter, the detective told Collins that he would not be subjected to any physical force ["hit"]. In response to a few questions, Collins denied guilt. Another detective entered the conversation, and again advised Collins of the *Miranda* rights. Collins indicated a willingness to speak to this officer, and the first detective left the room. Collins then made the first of two confessions, which were reduced to writing and signed. Each written statement bore the warnings. Before the second statement,* Collins was again advised of his *Miranda* rights.

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* The second confession differed from the first only as to Collins' movements before the crime.

The crux of the claim by petitioner is that his statement: "Can you recommend one [a lawyer]?" to the police officer on that single occasion constituted a request for the immediate services of an attorney which should have terminated the police-Collins conversation. The reviewing state courts concluded that the question was not a request for a lawyer,* as did the district court, which labelled the request, "one of curious inquiry."

The statement should not be isolated, out of context; rather its meaning and significance "must be determined from an examination of the totality of particular facts surrounding its making." *Tanner* v. *Vincent,* 541 F.2d 932, 936 (2d Cir. 1976). An examination of those surrounding circumstances here leads ineluctably to the conclusion that the state courts and the district court were correct in holding that Collins was not attempting to invoke his right to the assistance of counsel.

Initially, at least two *Miranda* warnings preceded the disputed exchange, two *Miranda* warnings followed it. And the oral admissions were followed by the signed written confessions, which themselves bore the *Miranda* warnings. At no time was there any other word from Collins which could be in any way construed as a request for counsel. And, as the district court noted, the detective, far from attempting to menace Collins or trick him by "glossing over" the issue of the rights to counsel, made repeated and obviously sincere attempts to insure that Collins knew what the right entailed, explaining what an

* In New York, a judge must find voluntariness beyond a reasonable doubt. *People* v. *Huntley,* 15 N.Y.2d 72, 78, 255 N.Y.S.2d 838, 843, 204 N.E.2d 179. "This is a higher standard than is constitutionally required." *Tanner* v. *Vincent,* 541 F.2d 932, fn. at 937 (2d Cir. 1976).

"attorney" meant in some detail. Further, Collins' conduct immediately before and after the disputed exchange is a good key to his thinking at the time of that exchange. Beforehand, Collins asked when he could make "my one phone call," and the detective stated that he could make as many calls as he liked, and asked if he wished to make any at that time, which he declined to do. And, immediately after the detective indicated that he was not permitted to recommend a specific attorney, it was Collins who then immediately changed the subject by asking when he would be "hit," whereupon the detective assured him that there would be no physical brutality. Collins then denied involvement in the crime, whereupon another detective entered the room. That officer yet again warned Collins of his rights, and, when Collins indicated that he felt more comfortable speaking to that individual, and after the other officers left, Collins made his first inculpatory admissions. In short, it is clear that Collins was attempting to "feel out" the procedures to be followed rather than seek outside assistance, as his declination of the proferred access to a telephone shows. Accordingly, this Court should "give precedence to substance over form" [*U.S.* v. *Lamia*, 429 F.2d 373, 375 (2d Cir.) *cert. denied* 400 U.S. 907 (1970)] and uphold the ruling of the district court to that effect.*

* As might be expected, nationwide authority on situations such as this one is piebald; for, as this Court once observed, such cases "must be considered *ad hoc* in each instance and resolved on the particular factual patterns presented." *U.S.* v. *Freeman*, 357 F.2d 606, 627 (2d Cir. 1966). Thus, most courts which have considered such an issue have resolved it by a close examination of the necessarily unique facts of each case. *Compare United States* v. *Bettenhausen*, 499 F.2d 1223 (10th Cir. 1974); *People* v. *Whitman*, 182 Colo. 6, 510 P.2d 432 (1973); *Grimsley* v. *State*, 251 So.2d 671 (D.Ct. App. Fla. 1971) [admissibility of confession upheld] *with People* v. *Superior Court*, 15 Cal.3d 729, 542 P.2d 1390, 125 Cal. Rptr. 795, *cert. denied* —— U.S. ——, 45 U.S.L.W. 3249 (1975) [confession suppressed].

b. If Collins did attempt to invoke his right to counsel, he thereafter waived that right.

Petitioner (brief, p. 33) claims that, once a man in custody invokes his right to counsel, a *per se* automatic prohibition springs into existence cutting off further inquiry, or even a further police re-advisement of the *Miranda* rights with a view towards seeking a "change of mind." However, even accepting that premise as true,* this cannot be the case where the invocation of counsel is, at best, ambiguous or dubious; for, in such situations the police surely must be allowed to explore the matter further in an attempt to resolve that ambiguity, in the interest of protecting the rights of the defendant as well as possibly eliciting a valid waiver.** Thus, in this case, where the questioner, as the district court found, possessed "a genuine concern for the protection of the petitioner's rights," the two *Miranda* warnings following the disputed exchange reasonably should be viewed as permissible police attempts to completely insure voluntariness and clear up any confusion. This being the case, there then was a valid waiver with respect to the inculpatory statements made after those warnings, even if the request for a recommendation of counsel is semantically viewed as an invocation of the right. Several recent cases have so held in similar situations. *See People* v. *Robinson,* 67 Mich. App. 442, 241 N.W.2d 238 (Ct. App. 1976); *State* v. *Travis,* 26 Ariz. App.

* A dubious acceptance. *Compare Michigan* v. *Mosley,* 423 U.S. 96, —— L.E.2d ——, 96 S.Ct. 321, *with Brewer* v. *Williams,* —— U.S. ——, 20 Cr.L. 3095 (1977), *and see United States* v. *Womack,* 542 F.2d 1047, 1050 (9th Cir. 1976). This Court has recently indicated disapproval of such *per se* rules in this area in *Tanner* v. *Vincent, supra.*

** Of course, the manner in which this is done may itself be coercive and lead to suppression. *See, e.g., People* v. *Harris,* 552 P.2d 10 (Colo. 76).

24, 545 P.2d 987 (Ct. App. 1976). *See also United States* v. *Jackson,* 436 F.2d 39 (9th Cir. 1970).

Finally, the exclusion of Collins's statement cannot serve the interests of the exclusionary rule: "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful or, at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as the result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the rights of the accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Michigan* v. *Tucker,* 417 U.S. 443, 447, 96 S. Ct. 2357, 2365, 41 L.E.2d 182, 194 (1974). Here, the police conduct was exemplary, and a mechanistic condemnation of that conduct would be itself an injustice.

c. Federal habeas review of the *Miranda* claim is foreclosed under the rationale of *Stone* v. *Powell.*

In his concurring opinion in *Brewer* v. *Williams, supra,* Mr. Justice Powell, the author of *Stone* v. *Powell, supra,* took note of the potential applicability of *Stone* to claims involving the Fifth and Sixth Amendments:

> "That question has not been presented in the briefs or arguments submitted to us, [f.n. omitted] and we therefore have no occasion to consider the possible applicability of *Stone.* The applicability of the rationale of *Stone* in the Fifth and Sixth Amendment context raises a number of unresolved issues. Many Fifth and Sixth Amendment claims arise in the context of challenges to

> the fairness of a trial or to the integrity of the fact-finding process. In contrast, Fourth Amendment claims uniformly involve evidence that is 'typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.' *Stone* v. *Powell*, —— U.S. at ——. Whether the rationale of *Stone* should be applied to those Fifth and Sixth Amendment claims or classes of claims that more closely parallel claims under the Fourth Amendment is a question as to which I intimate no view and which should be resolved only after the implications of such a ruling have been fully explored'' [20 Cr. L. at 3103-04].

This case presents a near-optimum opportunity for this Court to examine the application of *Stone* in a Fifth-Sixth Amendment context.* It is obvious that the kind of claim raised here—at most a technical and good faith ''violation of one of the *Miranda* prophylaxis'' [dissenting op. of Mr. Chief Justice Berger, in *Brewer,* 20 Cr. L. at 3124] involves evidence which is reliable, probative, and which was not obtained in such flagrant, or willful violation of any of the defendant's rights as to impair the ''integrity of the fact-finding process.''** Rather, the entire issue turns on the interpretation to be placed upon what is at best an ambiguous bit of language. As previously noted, there can be no deterrent effect, for the police officer could not have been more scrupulous in attempting to safeguard petitioner's rights. Accordingly, *Stone* v. *Powell* should operate to bar further review of this claim.

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* The application of *Stone* to the instant claim was raised, briefed, and argued by respondent before the district court. *Brewer* was decided after the district court's decision.

** We do not claim that *Stone* precludes review of the claim that his confession was involuntary (and potentially therefore untrustworthy) due to physical coercion (*infra*).

d. There was no physical coercion.

The Court Court of Nassau County, at the suppression hearing, was presented with a claim of physical brutality. Collins testified that he had been beaten brutally and repeatedly for some twelve hours, from the time of his arrest to his confession. He said that he made the statements to the police only after he could no longer resist the police, and that he received numerous injuries, such as a "busted nose," which rendered him so sore that he could barely stand up (420, 436-37, 450-52, 615-17, 660-61). In support of this story, the defense called Dr. Tabmoures Finoozi, a Nassau County Medical Center doctor who had examined Collins on the afternoon following his early morning arrest. The doctor found a small one inch scratch over Collins' left eyebrow, a condition known as "CVA tenderness" [a tenderness in the flanks without cut or bruise], and some red blood cells in Collins' urine. Collins complained of being beaten, but, accordingly to x-ray examination, had no symptoms like kidney or liver damage or any cuts or bruises other than the scratch over the eye. He also told the doctor that he had had a recent operation (474-75).

All the police officers who had contact with Collins' arrest, or with a subsequent investigation in connection with the brutality claim, denied any such beatings, and photographs taken of the defendant at the time of these events indicated no signs of such an attack.

Thus, the Nassau County Court was presented with an issue of credibility, which it resolved against the petitioner (A 13-17).

In this forum, Collins still maintains that he was beaten. He recognizes that such a claim is grounded in credibility and hence normally doomed to failure here, pursuant to 28 U.S.C. 2254(d). *See Tanner* v. *Vincent, supra,* 941 F.2d at 934, 937; *United States ex rel. Cerullo* v. *Follette,* 416 F.2d 136 (2d Cir.) *cert. denied* 397 U.S. 1000 (1969); *Lokos* v. *Capps,* 528 F.2d 576 (5th Cir. 1976); *United States ex rel. Loray* v. *Yeager,* 446 F.2d 1360 (3d Cir. 1971). However, he claims that this is not the case herein, alleging that the findings of the state courts are unsupported by the record. [28 U.S.C. 2254(d)(8)]. He is wrong. The hearing court had numerous, excellent reasons for disbelieving Collins' story and believing the police, and Collins is now merely attempting to reexamine "facts already probed in detail by the state court." *United States ex rel. Stanbridge* v. *Zelker,* 514 F.2d 45, 51 (2d Cir. 1975).*

Even a cursory review of the situation shows the validity of the county court's findings on this issue. Collins had a scratch over his eye, alleged "flank pain" [the diagnosis here was based entirely on subjective complaint], and a red blood cell content in his urine which could, as Collins' own doctor-witness testified, have had 20-30 causes, including recent trauma or physical exertion (475-77). That this was the only result of the intensive 12-hour beating and blackjacking described by Collins strains credulity. Further, x-rays taken by the doctor-witness showed no internal injuries consistent with such a beating, nor were there any external *indiciae* of an attack (488, 507-15).

* Petitioner must "establish by convincing evidence that the factual determinations in the *Huntley* hearing were erroneous. *Id.*

And, there were holes in the story itself. For example, as the district court noted, Collins initially claimed that he was injured in the right eye, and changed the site of the injury to the left eye after hearing the doctor testify that the scratch was over his left eye (420-21, 436-37, 660-64). He stated that the beating started on the street in Freeport, testimony contradicted by the rape victim herself (18-20, 60-64, 330-32, 416-19). There were no policemen fitting this description of the assailants in the case or at the precinct (A 12, 28). And, of course, the story was contradicted by numerous police officers. Nor should it be forgotten that, as noted by the county court, Collins' brutal rape had involved him in a violent battle with his victim, a struggle which might have resulted in the production of one or more of these symptoms. In sum, the hearing court had a more than sufficient basis for rejecting the story, and the district court appropriately dismissed this claim.

Conclusion

The order of the District Court dismissing the petition should be affirmed.

Respectfully submitted,

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#6074

Affidavit of Service by Mail

In re:

Collins v Fogg

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on APR 29 1977, 197 , he served 3 copies of the within Brief in the above-named matter on the following counsel by enclosing said three copies in a securely sealed postpaid wrapper addressed as follows:

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400 County Seat Drive
Mineola, New York 11501

(Attorney for Petitioner-Appellant)

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

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Harry Minott

Sworn to before me this 29th day of April, 1977

Jack A. Messina

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Notary Public, State of New York
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